Software & Information Industry Association
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September 13, 2004

Mr. Donald S. Clark, Secretary
Federal Trade Commission
Room 159-H, 600 Pennsylvania Avenue, NW
Washington, DC 25080

RE: CAN-SPAM Act Rulemaking, Project No. R 411008 --Definitions, Implementation and Reporting Requirements Under the CAN-SPAM Act

Dear Mr. Clark:

On behalf of the members of the Software & Information Industry Association (SIIA), we offer our comments on the above-referenced Notice of Proposed Rulemaking, defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.

As the principal trade association of the software code and information content industry, the more than 600 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

Our members, as stated in our previous comments, will benefit from the effective and consistent enforcement of the CAN-SPAM Act ('the Act"). As leaders in our industry, our members have an interest in combating fraudulent, deceptive and unwanted email communications, and effective enforcement, especially at this early stage of implementation of the Act, will go far toward building confidence in the digital marketplace.

General Conclusions

On the whole, the framework taken by the Federal Trade Commission (FTC) of delineating a tripartite approach to email – commercial and two types of "dual purpose" electronic messages – is one that we believe is generally workable. In particular, SIIA commends the FTC for declining to adopt a rigidly mechanical "proportion" standard for determining the primary purpose of a message, and instead taking a "net impression" approach as recommended in our comments at the preliminary stage of this proceeding. We

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appreciate the enormous time pressures imposed on the FTC in producing this mandatory Rule, as well as undertaking discretionary Rulemaking. We look forward to working with the Commission as implementation of the Rule goes forward to assess whether this approach, in the end, both is implemented practically and is consistent with requirements of the Act.

Our general conclusion is predicated on addressing, as our comments that follow identify, specific areas where we believe the Proposed Rule put forward by the FTC is unclear, may lead to unnecessary confusion, and may be inconsistent with the requirements of the Act. These comments focus especially on the two-part test suggested for dual-purpose transactional messages and for dual-purpose content messages.

SIIA also reiterates several areas from our previous comments that we believe the FTC must act upon before the Final Rule comes into effect.

We also want to take this opportunity to compliment the FTC on its Report to Congress regarding the National Do Not Email Registry.[1] As SIIA indicated in its comments to you on this subject,[2] there is a host of practical and policy issues associated with such a Registry and, in the final analysis, it would do little, if anything, to address the pervasive effects of deceptive and unwanted email communications and may very well make the situation worse. SIIA looks forward to working with the FTC as it undertakes the follow-on steps identified in its Report.

Avoid Unnecessary Confusion in Identifying "Dual Purpose Transactional or Relationship Messages"

In its "Analysis of the Body of a Dual-Purpose Message to Determine the Message's Primary Purpose,"[3] and in the proposed Rule set out in 16 CFR Part 316.3(a)(2), the FTC puts forward what may be inconsistent, and certainly unclear, steps for making such a determination. As discussed below, it is our view that this is a result of the FTC's unnecessary reliance on subject headers in constructing the "primary purpose" test for transactional or relationship messages.

For example, in the opening paragraph of the above referenced "Analysis", the Proposed Rule states that "if a recipient reasonably interpreting the subject of a message would not likely conclude that the message advertises or promotes a product or service, then the Commission proposes … additional criteria relevant to determining a message's `primary purpose.'"[4] This construction appears to require an affirmative determination based on the standard of a reasonable recipient. The very next paragraph sets out the `additional' criterion

[1] June 15, 2004. http://www.ftc.gov/reports/dneregistry/report.pdf.
[2] Letter to the FTC, March 31, 2004. http://www.siia.net/govt/docs/pub/spam_letter_033104.pdf.
[3] Section II.C.1.b. of the Proposed Final Rule, page 17 *et seq.*
[4] Ibid. (emphasis in original)

following this determination: "the message shall be deemed to be commercial if the message' content pertaining to … the message's transactional or relationship content does not appear at or near the beginning of the message."[5] The proposed language of the Rule itself posits a more draconian "take it or leave it" approach such that even if the transactional or relationship functions are up front (and without consideration of the overall "net impression" of the electronic communication), the "primary purpose" of the email is deemed commercial if "a recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service."

By contrast, the same section of the Proposed Rule "Analysis" puts forward progressively distinct formulations. First, the Proposed Rule, noting the "clear guidance" it intends to give senders, states that "if the subject line criterion is *not determinative*, such dual purpose [transactional or relationship] messages have a commercial primary purpose unless the transactional or relationship content appears at or near the beginning of the message."[6] At the section's end, the formulation is further pared down to state simply, "[f]or messages containing both commercial and transactional or relationship content to be considered `transactional' rather than commercial, the Commission's proposed `primary purpose' criteria would require only that senders of such messages place their transactional or relationship content `at or near the beginning of the message.'"[7] These later two formulations do not depend on any determination related to a reasonable sender's reading of the subject line.

In SIIA's view, the later formulations are both more workable, consistent with the Act, and fulfill Congress' desire not to preclude legitimate electronic communications, *especially in light of the FTC's adoption of a "net impression" test*. As the FTC acknowledges, Congress sought "largely to exempt transactional or relationship messages from CAN-SPAM requirements."[8] This was critical because many types of messages should not be required to have an opt-out (e.g., bill statements) either from the perspective of the sender or on the part of the reasonable recipient. In creating an exclusion from the Act's requirements for transactional or relationship messages, Congress recognized that transactional messages are distinct forms of electronic communications and should not be burdened in the same manner as commercial emails.

Unfortunately, the FTC's attempt to tie a reasonable recipient's reading of the subject line to its criteria test of placement risks eviscerating the important role of transactional or relationship messages established by Congress. It also comes precariously close to establishing a "primary purpose" test of the *subject line* and not of the electronic message, as required by the Act.

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[5] Section II.C.1.b.i. at p.18. (emphasis in original).
[6] Id. at p. 19.
[7] Id. at p. 20.
[8] Ibid.

In short, the recipient's perception of the subject line, however reasonable, should not be the determining factor in whether such an email has a primary purpose that is transactional or relationship-based (or for that matter whether the "primary purpose" is commercial, either). We note that the FTC, under this formulation, would still have the ability to determine whether a subject line is deceptive; however, this would be a separate determination from what constitutes a dual purpose transactional or relationship message.

SIIA's urging of the FTC to adopt the formulation stated above is also consistent with our prior comments where we identified a number of types of emails that we believe are not commercial emails (as measured by a "primary purpose" test) and which we asked the FTC to either clarify or, if necessary, add to the categories established in the Act. These included emails that provide critical customer information that is, for example, legally required or otherwise prevents adverse effects on customers; single emails sent on an individual basis, often in response to a customer or partner; emails regard training; and subscription or license renewals. If the FTC is not going to establish a specific exemption for certain classes of transactional or relationship messages that are not otherwise listed in the Act, it is our strong view that the test of "primary purpose" for these emails should not be burdened with the determination of a reasonable recipient's reading of the subject header along with criterion for placement of the material.

Comments on
"Dual Purpose Messages that Contain Both Commercial Content and Content that is Neither Commercial Nor Transactional\Relationship"

SIIA recognizes that electronic communications of these kinds merit a different standard than the previously discussed category, and, based on our preliminary analysis, have no objection to the analytical approach taken by the Commission that is based largely on its approach to advertising.

However, our comments above are equally applicable here. For example, the Proposed Rule states that "[i]n the case of a bona fide electronic newsletter, application of this analysis likely to result in the conclusion that the message does not have a primary purpose that is commercial."[9] SIIA supports this conclusion. What is not clear, however, is why the FTC's conclusion depends on the reasonable recipient's reading of the subject line *in light of the application of the FTC's existing doctrine on advertising.*

[9] Section II.C.1.c. at p. 32.

To restate our earlier point, tying the definition of "primary purpose" to a determination of a recipient's reasonable reading of the subject header is confusing, not supported by the Act, and risks unnecessary headaches for the FTC, senders and recipients.

Other Subjects Raised in the Prior Proceeding that Should be Addressed Before the Final Rule Goes Into Effect

In our comments in April, SIIA raised a targeted set of issues in the context of the FTC's discretionary rulemaking authority and in response to questions posed in the Advanced Notice of Proposed Rulemaking. Below, we identify those that, in our judgment, need to be addressed by the FTC before the Final Rule goes into effect in December.

Joint Marketing Efforts. Our industry has a great deal of experience in and benefits from joint marketing efforts involving a variety of development partners, distributors, and channels. As the FTC has correctly pointed out, the definition of "sender" contemplates that more than one person can be a "sender" of commercial email because an email can include promotions or advertising from a multitude of companies. If the obligations of the "sender" are imposed on all the companies included in the email promotion, the costs of compliance of these joint marketing efforts – which are legitimate and useful tools to companies and provide real product and service information to customers (both consumer and businesses) – would escalate enormously and make otherwise normal course-of-business dealings unnecessarily complex without any demonstrable benefit to recipients (especially consumers). Some examples follow.

- If a joint marketing email must include an opt out mechanism for all senders, it could require that suppression files be transmitted and shared among many companies. Many of our member companies include in their privacy policies statements that they do not share personally identifiable information with outside companies for promotional use. Transferring suppression files could run afoul of such privacy assurances, perhaps necessitating revision to company policies, and certainly weakening the protections made to customers. Furthermore, requiring all companies with advertising or promotions to be "senders" under the Act and thus share and transfer customer files to meet the standards increases the opportunity for inappropriate use of the customer data and seriously raises the risk of the customer data "falling into the wrong hands." Because our companies often include security safeguards in their policies (either voluntarily or as required under the Gramm-Leach-Bliley Act), companies run the risk of violating their statements, or having to water down the assurances provided in their privacy promises to customers.

- In addition, many joint marketing efforts are executed through agreements that allow one partner to construct and implement email campaigns without the knowledge or

control by the company whose product or service is being incorporated. For example, a brick-and-mortar retailer may send out email communications selling a variety of software or information products to the retailer's own customer base. In those cases, the retailer may not (and often does not) inform the product or service company about the marketing campaign (either because the product is often one that can be bought "off the shelf" at the retailer's stores or the underlying marketing agreement leaves the details open-ended).

- A similar, but unique situation exists in the marketing programs of enterprise-level redistributors, which may bundle a variety of products or services (many of which may be related and necessary to successful end user implementation) from different vendors into marketing campaigns without the knowledge or control of the companies that developed the products or services. Because redistributors act independently of the vendor companies, the latter have no way of knowing or controlling the timing or specifics of the email communication because the relationship is between the redistributors and the customer. The management of opt out requests in these situations is not merely overwhelming, it raises similar issues regarding the privacy and security policies identified above.

SIIA, therefore, urges the FTC to recognize the importance of these joint marketing and redistribution efforts and ensure that the definition of "sender" does not impose costly operational burdens on companies nor force them to act either in conflict with their privacy policies or water them down so as to meet the requirements of the CAN-SPAM Act. As a preliminary matter, the FTC might consider a definition of "sender" that is tied to the directing and controlling of the development and implementation of the email marketing campaign taking into account the role played in defining final email communication copy, determining the recipients of the campaign, overseeing the operations of the promotions, and ultimately the primary relationship with the targeted recipients.

"Forward-to-a-Friend" Programs. In the view of SIIA, "forward-to-a-friend" and similar marketing campaigns that rely on customers or other individuals to refer or forward commercial emails to someone else do not fall within the parameters of "inducing" a person to initiate a message on behalf of someone else. It is important that the FTC understand that there is no "one size fits all" way in which these legitimate and useful initiatives operate.

For many companies, "forward-to-a-friend" programs (available through websites or in emails) merely facilitate the easy transfer of information about a product or service from a customer to someone else (i.e. their friend or colleague). A customer could accomplish the same goal by cutting and pasting the information into their own email and sending it to their friend. A "forward-to-a-friend" mechanism merely facilitates this process by saving the customer time and additional steps in accomplishing the same outcome (that is, getting information that the customer deems beneficial to the friend.)

In these kinds of cases, the friend's email address is used solely to forward the message and is not retained by the intermediary company. It, therefore, cannot be used to send future marketing to the recipient-friend, and as such there is a lack of justification to come under the scope and requirements of the Act. It would be difficult, if not impossible for the intermediary company to check against any "opt outs" that it has on file or otherwise satisfy the requirements of the Act.

In some "forward-to-a-friend" situations, the friend's email address is retained for future marketing use. However, in the event the email is subsequently used to send a commercial email, the requirements of the Act would come into operation either through the process of running suppression lists of "opt outs" or, where no opt out is evident, after receipt of the initial "tell-a-friend" email by the recipient. In the latter situation, the follow-on email from the "forward-to-a-friend" program would contain a notice of future use of the recipient's email address and an opt out mechanism. If the friend subsequently opts out, the email address would then be suppressed from receiving any future marketing communication from the company whose product is being promoted or advertised.

This view is both consistent with the requirements of the Act and does not result in a detrimental effect on recipients (who may be either consumers or businesses). Forward-to-a-friend" emails are sent on an individual basis and are not the subject of bulk email campaign. Any further treatment of these kinds of communications puts the FTC into the precarious situation of overregulating individual emails between friends or colleagues with an established relationship.

10-business-day time period for processing opt-out requests. Based on our industry's experience, the end-to-end timeframe for accurately and effectively completing opt-out requests exceeds the current 10-business-day time period prescribed in the Act. Even with years of experience in this area, and use of high-quality information technology, our industry finds that this time frame is inadequate to account for a process that includes generating the recipient list (often in batches), preparing and running the suppression (opt out) file against customer list or lists, comparing against customers who have previously opted out, delivering the list to service provider(s), conducting quality assurance testing, and finally updating the customer lists. Our members, even our smaller and medium sized companies, process thousands of such transactions a day. As a result, preparation of suppression files for data extraction and updating and cleansing duplicative records can take significant amounts of time. The 10-business-day time frame also does not recognize the fact that our member companies work with multiple service providers.

SIIA urges the FTC to modify Section 5(a)(4) of the Act to provide that senders have no more than thirty-one (31) days after receiving a recipient's opt-out request to process it and put it into effect. This modification not only achieves the purposes of subsection 5(a), it goes far toward minimizing the costs and operational burdens imposed on senders of lawful

commercial electronic mail. It assures that the interests of the commercial email recipients are carefully, accurately and reliably implemented. We note that this time frame is consistent with recent changes implemented by the FTC, as mandated by Congress, for processing updates to the "Do Not Call Registry" under the Final Amended Telemarketing Sales Rule.[10]

Once, again, we appreciate this opportunity to submit our comments. Please do not hesitate contact us if you have any questions.

Sincerely,

Mark Bohannon
General Counsel &
Senior Vice President Public Policy

[10] See 16 CFR 310.4(b)(3)(iv), as amended, which goes into effect Jan. 1, 2005. See http://www.ftc.gov/os/2004/03/trs31dayfrn.pdf.